STATE OF MICHIGAN

COURT OF APPEALS

KEVIN MACLACHLAN, Personal Representative of the Estate of DAVID MACLACHLAN,

Plaintiff-Appellant,

v

GLIDDEN PAINT COMPANY, d/b/a ICI PAINTS,

Defendant/Third-Party-Appellee,

and

DISCOUNT TIRE COMPANY, INC., and REINALT-THOMAS CORPORATION, d/b/a DISCOUNT TIRE COMPANY,

Defendants-Appellees,

and

VLAHAKIS FAMILY LTD PARTNERSHIP,

Third-Party-Defendant.

UNPUBLISHED
June 13, 2006

No. 266604
Ingham Circuit Court
LC No. 03-002134-NO

Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Plaintiff Kevin MacLachlan, as personal representative of the estate of David MacLachlan, appeals as of right from an order granting summary disposition in favor of defendants, the Glidden Paint Company (Glidden) and Discount Tire Company (Discount Tire). We affirm.

Plaintiff argues on appeal that the trial court erred when it dismissed plaintiff's claim on the grounds that the decedent was a licensee. A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The

pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. *Id.* A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

"Under the principles of premises liability, the right to recover for a condition or defect of land requires that the defendant have legal possession and control of the premises." *Morrow v Boldt*, 203 Mich App 324, 328; 512 NW2d 83 (1994). Landowners of property abutting a street are presumed to own fee title to the property to the center of the street, subject to the public right-of-way easement. *Id*. at 329. "The right-of-way in favor of the public resulting from the establishment of a public highway is presumed to be sixty-six feet in width." *Stevens v Drekich*, 178 Mich App 273, 276; 443 NW2d 401 (1989). "The owner of the fee subject to an easement may rightfully use the land for any purpose not inconsistent with the easement owner's rights." *Morrow*, *supra* at 329. "However, it is the owner of the easement, rather than the owner of the servient estate, who has the duty to maintain the easement in a safe condition so as to prevent injuries to third parties." *Id*. at 329-330. "'[W]hatever residual rights to a public right of way are retained by an adjacent landowner, they are not possessory in nature.'" *Id*. at 330, quoting *Stevens*, *supra* at 227. Here, premises liability theory is inapplicable because the decedent never entered property in defendants' possession, but was injured on the public right-of-way, Pennsylvania Avenue—property that was not in defendants' legal possession or control.

In addition, it is well-settled that landowners do not have a common law duty to the general public to keep public sidewalks abutting their property clear of natural accumulations of ice and snow. *Taylor v Saxton*, 133 Mich App 302, 306; 349 NW2d 165 (1984). In *Taylor* the decedent was killed under circumstances strikingly similar to those presented in the case at bar. The decedent in *Taylor* was killed by oncoming traffic when he walked from his hotel to a nearby restaurant on the street because the public sidewalk crossing the defendants' property was covered in 10 to 12 inches of snow. *Id*. at 304. This Court held that the landowners did not have a duty to keep public sidewalks clear of natural accumulations of ice and snow. *Id*. at 306.

There are two recognized exceptions to this rule. First, the landowner may be liable where the landowner takes affirmative action to alter the natural accumulation of ice and snow, increasing the hazard of travel to the public. *Zielinski v Szokola*, 167 Mich App 611, 615; 423 NW2d 289 (1988), overruled in part on other grounds in *Robinson v Detroit* (*On Remand*), 231 Mich App 361, 363; 586 NW2d 116 (1998). For purposes of this exception, a plaintiff must demonstrate that a landowner's act "introduced a new element of danger not previously present or created an obstacle to travel, such as a snow bank, that exceeds the inconvenience posed by a natural accumulation." *Skogman v Chippewa Co Rd Comm*, 221 Mich App 351, 354; 561 NW2d 503 (1997) (citations omitted). Alternatively, a landowner may be liable where the landowner takes an affirmative action to alter the underlying condition of the sidewalk itself, which then causes an artificial or unnatural accumulation. *Zielinski*, *supra* at 617. Here, plaintiff failed to demonstrate that defendants created the bank of snow or altered the underlying condition of the sidewalk to cause an artificial accumulation of snow or ice.

Plaintiff argues that even if defendants did not create the bank of snow, they were liable for any injury caused by it because the wall of snow was an "'artificial condition' on the land"

and that defendants "did consent or 'acquiesce' to the piling up of a huge wall of snow at the CATA bus stop site by a third party." However, liability under such a circumstance is conditioned on the premises owner's possession and control over the premises where the hazard originated or on the premises owner's affirmative act or control over the hazard itself. *Ward v Frank's Nursery & Crafts, Inc*, 186 Mich App 120, 132-133; 463 NW2d 442 (1990); *Stevens*, *supra* at 277; *Langen v Rushton*, 138 Mich App 672, 679-680; 360 NW2d 270 (1984). Here, plaintiff has offered no evidence to establish that defendants had possession and control over the area where the snow bank was formed, the sidewalk, or the bus stop. See *Morrow*, *supra* at 329-330.

Finally, plaintiff argues that the trial court erred when it concluded that the Lansing City Ordinance did not create a private cause of action. We disagree. This Court has specifically held that "a municipal ordinance . . . which imposes a duty upon a landowner to clear an abutting public sidewalk of snow and ice, creates a public duty for which there is no private right of action." *Taylor*, *supra* at 306.

Thus, we conclude that plaintiff has failed to demonstrate that defendants created the bank of snow or altered the underlying condition of the sidewalk to cause an artificial accumulation of snow or ice. In addition, plaintiffs have failed to demonstrate that defendants had possession and control over the premises where the decedent was injured or over the premise where the bank of snow existed. Therefore, regardless of the soundness of the trial court's rationale, we affirm the grant of summary disposition to defendant. See, e.g., *Grand Trunk Western R, Inc v Auto Warehousing* Co, 262 Mich App 345, 354; 686 NW2d 756 (2004) (noting that a trial court order will not be reversed "if the court reached the right result for the wrong reason.").

Affirmed.

/s/ Michael R. Smolenski
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray